

1. Did the claimant suffer a permanent injury arising out of and in the course of his employment with respondent?

2. Is the claimant's disability the result of natural aging process or the normal activities of day-to-day living?
3. What is the nature and extent of claimant's disability?

FINDINGS OF FACT

Claimant was a truck driver for respondent, hauling bulk dry cement. On September 20, 2004, claimant was delivering a load to the Lone Star plant in Kechi, Kansas. After the truck was unloaded, claimant walked across a parking lot to the offices. On the ground were 3 by 4 foot metal plates that the drivers walked across. As claimant crossed one plate, it shifted and claimant fell to the bottom of a 5-foot hole. The plate then fell on top of claimant. After a while, claimant climbed out of the hole and limped to the office. Claimant's left knee was injured, as was his right hand and right shin. Claimant drove the truck back to the Independence, Kansas, terminal but did not haul his second load. Claimant usually hauled two loads per day.

Claimant spoke to the terminal manager, Todd Mangan, and was sent to a doctor the next day. However, the doctor was not in so claimant was examined by a nurse practitioner, Angela Finney, of the Mears Medical Clinic. Claimant was taken off work by Ms. Finney and remained off work until Monday, October 4, when he was to return to regular duty. However, on Sunday, October 3, claimant's back began to hurt and he began to have severe spasms in his mid and low back. Claimant called respondent and told them that he would not be to work on Monday. Claimant told Ms. Finney about his back on October 5 and so was not released to return to work until October 11. But claimant did not return to work on that date as his back still hurt. Claimant finally saw Gregory H. Mears, D.O., on October 20, 2004, and was placed on light duty. Claimant was again returned to regular duty on October 22, 2004. However, claimant was again reluctant to return to work. He tried to see Dr. Mears again, but Dr. Mears' office would not give claimant an appointment.

Claimant then went to T. M. Venkat, M.D., on a self referral. Dr. Venkat referred claimant to Ervin Howell, M.D. X-rays were obtained, which displayed some degenerative spurring in the thoracic spine, but nothing was noted in the lumbar spine. Claimant requested an MRI with Dr. Howell, but Dr. Howell refused, finding no clinical indication for the test. At the examination on November 1, 2004, Dr. Howell did take claimant off work. Claimant had previously returned to work on light duty and did actually attempt light duty on occasion. However, when Dr. Howell took him off work on November 1, claimant "decided not to do anything."¹ As of the preliminary hearing on February 1, 2005, claimant was not working and was not attempting to find work.

¹ P.H. Trans. (Feb. 1, 2005) at 19.

Claimant was referred by his attorney to orthopedic surgeon Randall Hendricks, M.D., on December 1, 2004. Dr. Hendricks referred claimant for a lumbar MRI. However, Dr. Hendricks' interpretation of this MRI is not contained in this record.

As the result of the preliminary hearing, claimant was referred to board certified neurological surgeon Paul S. Stein, M.D., for an examination on March 14, 2005. Claimant described the accident to Dr. Stein, discussing the injuries to his right shin and left knee. Claimant also stated that he struck his low back on the rim of the opening. Claimant told Dr. Stein that he began having low back spasms about 13 days after the accident. Claimant was experiencing low back pain, pain around the left shoulder blade and neck, numbness in both legs and, occasionally, the left leg would drag. An MRI of the left knee was unremarkable. X-rays of the cervical and lumbar spine were reported as normal per the report of Dr. Hendricks. Dr. Stein reviewed x-rays of the cervical, lumbar and thoracic spines, all of which were normal, except for slight osteophytes anteriorly at the superior and interior surfaces of C5 and moderate degenerative changes in the thoracic spine. The physical examination of claimant was identified as unremarkable. Due to claimant's persistent symptoms, an MRI scan from the mid thoracic to the lumbosacral levels was ordered. The MRI was read as negative. At that point, Dr. Stein released claimant to return to work, stating that he had nothing further to recommend. Dr. Stein provided no work restrictions and determined that claimant had not lost the ability to perform any work tasks as the result of this accident.

At some point in the spring of 2005, claimant was terminated from his employment with respondent. Claimant applied for unemployment benefits and was awarded same. After about three weeks of unemployment, claimant began working at Securitas, earning \$8.50 per hour and working 34 hours per week on average. This job lasted about 9 months, at which time claimant quit due to what claimant described as abusive language used by his supervisor. His last day there was December 19, 2005. Claimant remained unemployed until November 2007, when he began working for USSA, an airplane facility, doing security work. Claimant receives \$9.35 per hour and works 40 hours per week without fringe benefits. At the time of the regular hearing, claimant was still working for USSA.

At the regular hearing, claimant testified that he twisted his neck and back when he fell into the hole. He also testified that the neck and back pain began about 13 days after the accident.

Claimant was referred by his attorney to board certified orthopedic surgeon Edward J. Prostic, M.D., on June 24, 2005. Dr. Prostic diagnosed claimant with chronic sprains of his thoracic and lumbar spine as a result of the work related injury with respondent. In reviewing the MRIs and x-rays performed on claimant, he saw degenerative changes in claimant's spine. He noted mild facet arthropathy at L5-S1, which he doubted was caused by the fall. He rated claimant as having a 10 percent permanent partial impairment to the

body as a whole on a functional basis, pursuant to the *AMA Guides*.² Claimant was restricted from lifting weights over 50 pounds occasionally, or 20 pounds frequently, and should avoid frequent bending or twisting at the waist. Claimant was also to avoid using vibrating equipment and limit his standing or sitting to no more than 50 minutes at a time. On cross-examination, Dr. Prostic was told that claimant did not report problems with his back for 13 days after the fall. Dr. Prostic stated that was significant as it raises the possibility of an intervening injury. In reviewing the task list prepared by vocational expert Jerry Hardin, Dr. Prostic found 22 of 37 nonduplicative tasks that claimant could no longer do. This calculates to a 59 percent task loss.

Claimant was later referred by his attorney to board certified orthopedic surgeon C. Reiff Brown, M.D., for an examination on February 14, 2006. Dr. Brown diagnosed claimant with sprains of the left and right knees which had subsided completely. He also diagnosed lumbosacral tenderness, pain in the lumbar area on movement and arthrosis in the facet joints, which he stated could explain the lumbosacral discomfort. He suspected early degenerative disc disease at L5-S1. However, he acknowledged that the MRI obtained by Dr. Stein seemed to rule that out. Many of claimant's problems were the result of physical deconditioning which claimant could overcome with activity. Dr. Brown rated claimant at 5 percent to the whole body for the low back pain, finding claimant in DRE thoracolumbar Category II in the *AMA Guides*. Claimant was limited to no lifting over 60 pounds occasionally, and 40 pounds frequently. The impairment was based on the facet arthrosis at L5-S1, which is Dr. Brown's explanation for claimant's ongoing back pain.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.³

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁴

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an

² American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

³ K.S.A. 44-501 and K.S.A. 44-508(g).

⁴ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁵

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.⁶

It is not disputed that claimant suffered an accidental injury on September 20, 2004, which arose out of and in the course of his employment with respondent. It is the nature and extent of that accident which brings this matter to the Board. Claimant originally complained of left knee, right hand and right shin pain. His original treatment appears to be limited to his left and right knees. However, the knee injuries have fully recovered without permanent impairment. The ongoing problem is claimant's back. The record conflicts regarding whether claimant suffered immediate problems with his back or whether the symptoms surfaced 13 days later. Claimant testified at the regular hearing that he hit his low back during the fall into the hole and relates his back symptoms to that accident. The Board finds claimant to be credible and finds his back condition to be related to that fall.

K.S.A. 44-510e defines functional impairment as

. . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.⁷

Three physicians testified in this matter regarding claimant's functional impairment. Dr. Stein found that claimant had suffered no permanent impairment from this accident. Dr. Prostig found that claimant had suffered a 10 percent impairment to the whole body, with Dr. Brown finding a 5 percent whole body impairment. The Board finds that claimant did suffer permanent impairment to his low back from this fall, and the most credible evidence of the resulting impairment comes from Dr. Brown. Claimant has suffered a 5 percent functional impairment to the whole body.

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the

⁵ K.S.A. 44-501(a).

⁶ *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

⁷ K.S.A. 44-510e(a).

ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.⁸

Both Dr. Stein and Dr. Prostic provided opinions regarding what, if any, task loss claimant suffered from this accident. Dr. Stein found no task loss or need for restrictions. Dr. Prostic found claimant lost the ability to perform 22 of the tasks on Jerry Hardin's task list. The ALJ found a 51 percent task loss. However, in considering the tasks, the Board finds that there are 37 nonduplicative tasks on the list. Applying the proper calculations results in a task loss of 59 percent rather than the 51 percent used by the ALJ. In considering both task loss opinions, the Board finds claimant has suffered a 29.5 percent task loss as the result of the accident on September 20, 2004.

For many years, the wage loss factor of K.S.A. 44-510e considered whether claimant put forth a good faith effort to find work after an accident.⁹ However, the Kansas Supreme Court recently determined that good faith is no longer an appropriate element when considering a permanent partial general disability calculation. In *Bergstrom*¹⁰, the court disapproved the *Foulk* and *Copeland* line of cases which considered the element of good faith. The statute does not contain the element of good faith and the court ruled in *Casco*¹¹ that courts must give effect to the express language of a statute. Therefore, the element of good faith should no longer be considered when determining the wage loss percentage. As such, the Board must use the actual wages in calculating what, if any, wage loss a claimant suffered as the result of a work accident.

Here, claimant worked from April 19, 2005, to December 19, 2005, earning \$8.50 per hour and working 34 hours per week, without fringe benefits. This calculates to a wage of \$289 per week, which results in a wage loss of 64 percent when compared to claimant's average weekly wage of \$801.42. When averaged with the task loss of 29.5 percent, this calculates to a work disability of 46.75 percent. From December 2005 to November 2007, claimant was unemployed. Therefore, pursuant to the court's ruling in *Bergstrom*, claimant had a 100 percent wage loss during this time. When averaged with the task loss of 29.5 percent, this results in a work disability of 64.75 percent. In November 2007, claimant

⁸ K.S.A. 44-510e.

⁹ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997); *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

¹⁰ *Bergstrom v. Spears Manufacturing Company*, ___ Kan. ___, ___ P.3d ___ (2009) (No. 99,369, 2009 WL 2834485, filed September 4, 2009).

¹¹ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh'g denied* (2007).

started working at USSA, earning \$9.35 per hour and working 40 hours per week, a weekly wage of \$374.00 which calculates to a wage loss of 53 percent. When averaged with the task loss of 29.5 percent, this results in a work disability of 41.25 percent.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed with regard to the finding that claimant suffered a 5 percent whole body functional impairment to his low back as the result of the fall on September 20, 2004, but modified with regard to the permanent partial general (work) disability suffered by claimant as the result of that accident. For the period from April 19, 2005, through December 19, 2005, claimant suffered a work disability of 46.75 percent. For the period from December 20, 2005, to October 31, 2007, claimant suffered a work disability of 64.75 percent. For the period from and after November 1, 2007, claimant suffered a work disability of 41.25 percent.

Additionally, the ALJ approved the fee agreement between claimant and his attorney. This file contains no attorney fee agreement between claimant and his current attorney. As such, there can be no approval of that fee agreement. Should claimant's counsel desire a fee be approved, he must file and submit this written contract to the Director for approval. Upon its approval, the lien filed by attorney Kala Spigarelli should be satisfied pursuant to the stipulation of claimant's current attorney.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated May 1, 2009, should be, and is hereby, modified as follows: Claimant suffered permanent injury to his low back resulting in a 5 percent whole body disability from the accident on September 20, 2004, with a resulting permanent partial general disability suffered as the result of that accident. For the period from April 19, 2005, through December 19, 2005, claimant suffered a permanent partial general disability of 46.75 percent. For the period from December 20, 2005, to October 31, 2007, claimant suffered a permanent partial general disability of 64.75 percent. For the period from and after November 1, 2007, claimant suffered a permanent partial general disability of 41.25 percent. The Award of the ALJ is reversed with regard to the approval of a fee agreement between claimant and his current attorney as above noted.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, and against the respondent, Transwood, Inc., and its insurance carrier, Great West Casualty Company, for an accidental injury which occurred September 20, 2004, and based upon an average weekly wage of \$801.42 for 21.86 weeks of temporary total disability compensation at the

rate of \$449 per week or \$9,815.14, followed by 20.41 weeks of permanent partial disability compensation at the rate of \$449 per week or \$9,164.09 for a 5 percent functional disability, followed by 35 weeks of permanent partial disability compensation at the rate of \$449 per week or \$15,715 for a 46.75 percent work disability, followed by 97.29 weeks of permanent partial disability compensation at the rate of \$449 per week or \$43,683.21 for a 64.75 percent work disability, followed by 15.66 weeks of permanent partial disability compensation at the rate of \$449 per week or \$7,031.34 for a 41.25 percent work disability, making a total award of \$85,408.78.

As of September 18, 2009, there would be due and owing to the claimant 21.86 weeks of temporary total disability compensation at the rate of \$449 per week in the sum of \$9,815.14 plus 168.36 weeks of permanent partial disability compensation at the rate of \$449 per week in the sum of \$75,593.64 for a total due and owing of \$85,408.78, which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this ____ day of September, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned Board Member respectfully dissents from the award of the Majority. Claimant fell into a hole on September 20, 2004 and had pain in his left knee, right hand and right shin. None of these injuries resulted in a permanent injury. Additionally, claimant displayed no symptoms to his back or neck at the time of this injury. Claimant also testified at the preliminary hearing that his low back problems did not begin

for 13 days after the accident. This Board Member would find that claimant has failed to prove any injury to his low back and neck as the result of this accident.

Board Member

c: Patrick C. Smith, Attorney for Claimant
Kala Spigerelli
Alexander B. Mitchell II, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge